No. 80-676

Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1980

GERALD L. SHARGEL, Attorney on behalf of VINCENT ALOI,

Petitioner,

against

CHARLES E. FENTON, Warden of the Federal Penitentiary of Lewisburg as agent for the State of New York; and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

In *United States* v. *Apfelbaum*, 445 U.S. 115 (1980), this Court held that there was no violation of the Fifth Amendment's privilege against self-incrimination by the introduction of a defendant's immunized truthful grand jury testimony at his perjury trial. The Court noted that the introduction of such evidence was limited only by any applicable evidentiary rules.

The question presented by this case is whether a state judge erroneously ruled that a defendant's immunized truthful grand jury testimony was relevant and admissible at his perjury trial, and, if the ruling was erroneous, whether the introduction of that immunized testimony violated the privilege against self-incrimination?

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Preliminary Statement

This is the second petition for certiorari in this case. The State first sought certiorari from a judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the District Court granting a writ of habeas corpus to state prisoner Vincent Aloi. This Court granted certiorari (445 U.S. 922) and summarily vacated the judgment and remanded to the Second Circuit for

further consideration in light of *United States* v. *Apfelbaum*, 445 U.S. 115 (1980). Upon remand, the Second Circuit vacated its earlier judgment and directed the District Court to dismiss the petition. A petition for rehearing and hearing en banc was denied on August 25, 1980. Aloi now seeks a writ of certiorari to review the judgment of the Second Circuit which directed dismissal of the habeas corpus petition.*

Statement of the Case

Introduction

This controversy arises over Aloi's attempt to set aside his August 7, 1973 New York State conviction for PERJURY IN THE FIRST DEGREE (New York Penal Law § 210.15) by seeking a writ of habeas corpus. Aloi's conviction arose from his false testimony before a New York County grand jury which was investigating the murder of reputed organized crime figure Joey Gallo. Aloi received an indeterminate sentence of from two and one-third to seven years imprisonment for his offense.

The State Court Proceedings

A. The Grand Jury Investigation

In 1972, a New York County grand jury was investigating the killing of reputed organized crime figure Joey Gallo in a downtown Manhattan restaurant on April 7, 1972. The grand jury heard evidence that certain individ-

* Aloi was enlarged on bail until September 26, 1980 when the Second Circuit denied his motion to stay the mandate pending this petition for certiorari. On September 29, Aloi surrendered in New York Supreme Court. Aloi is presently incarcerated in Ossining Correctional Facility, Ossining, New York.

uals had used an apartment in Nyack, New York as a meeting place for planning Gallo's murder and for attempting to conceal the identity of the perpetrators after the murder was committed. The grand jury also heard evidence that Vincent Aloi had been present at several of the meetings in the apartment (T. 334-336).*

Aloi appeared before the grand jury, pursuant to a subpoena, on November 28, 1972. Under New York law, Aloi received automatic transactional immunity from prosecution for his testimony. New York Criminal Procedure Law §§ 50.10(1), 190.40. His immunity did not extend, however, to a prosecution for perjury. New York Criminal Procedure Law § 50.10(1).

Aloi testified before the grand jury that he had never been to the apartment in Nyack, New York. Despite the fact that the apartment in question was called to Aloi's attention in various ways, he repeatedly denied ever visiting that apartment (T. 456-462).

Subsequently, Aloi was indicted for Perjury in the First Degree for falsely swearing that he had never been to the Nyack apartment used to plan Gallo's murder.

B. The Trial

At trial, two Federal Bureau of Investigation agents testified that they had observed Aloi enter the Nyack apartment eleven days after Gallo was murdered. Another witness, Joseph Luperelli, who had been involved in the killing of Gallo, testified that Aloi had been to the apartment on

* Page references preceded by "T." are to the trial minutes

several occasions both before and after the murder (T. 121-123, 190-191, 231-233, 273, 485-488, 525-526).

When the prosecutor sought to introduce Aloi's grand jury testimony, defense counsel objected to the admission of any of the grand jury testimony other than the portion charged in the indictment to be perjurious. The trial judge overruled that objection, but invited defense counsel to object to particular statements made by Aloi before the grand jury which the defense counsel considered prejudicial (T. 349-354). Defense counsel, however, refused to request deletion of specific items in the grand jury minutes. The judge himself then suggested deletion of some material (T. 357, 359-360), and finally directed defense counsel to review the grand jury minutes and present any objections he had to specific statements (T. 358-360). Defense counsel still did not ask to have particular statements deleted (T. 360-361), except for one request which was granted (T. 363-364).

The trial judge admitted the remainder of Aloi's grand jury testimony and instructed the jury that the grand jury testimony was not to be considered "for its truth" but solely to show what had transpired before the grand jury. He further cautioned the jurors that the record of Aloi's grand jury appearance, apart from the statements concerning the Nyack apartment, could be considered only for its bearing on the issues of materiality* and Aloi's state of mind in making the statements charged to be perjurious (T. 332, 362-363, 642-643, 652-653).

* Under New York law, the issue of materiality is an issue for the jury to determine. *See People* v. *Ianniello,* 36 N.Y.2d 137, 143-144 (1975).

Aloi's conviction for perjury was unanimously affirmed by a June 11, 1974 order of the Appellate Division, First Department, of the New York Supreme Court. 76 A.D.2d 806. On July 10, 1974, and again on September 10, 1974, after reargument, leave to appeal to the New York Court of Appeals was denied.

The Federal Court Proceedings

On October 13, 1978, the District Court for the Southern District of New York granted a writ of habeas corpus on Aloi's claim that his privilege against self-incrimination had been violated by the admission at trial of more than "*minimal relevant* and *essential* other testimony necessary to place the alleged perjury in its proper context." 459 F. Supp. 700, 705 (S.D.N.Y. 1978) (emphasis in original). The District Court also rejected the State's contention that the introduction of the record of Aloi's grand jury appearance was, if error, harmless. *Id.* at 707.

The United States Court of Appeals for the Second Circuit affirmed the order granting the writ. 596 F.2d 42 (2d Cir. 1979). As stated above, however, this Court granted certiorari and remanded the case and the Second Circuit reversed its position and directed dismissal of the petition.

ARGUMENT

No substantial question is presented by the introduction of portions of Aloi's immunized grand jury testimony at his subsequent trial for perjury which the state courts concluded were admissible under state evidentiary rules.

Aloi claims that his Fifth Amendment privilege against self-incrimination was violated by the admission of allegedly irrelevant portions of his immunized grand jury testimony at his perjury trial. This claim raises no substantial federal question for this Court to review.

This Court's recent opinion in *United States* v. *Apfelbaum,* 445 U.S. 115 (1980) is dispositive of Aloi's constitutional claim. In *Apfelbaum,* this Court held that the Fifth Amendment did not bar the admission of immunized grand jury testimony at a subsequent prosecution for perjury based upon perjury committed before the grand jury. The Court recognized that such grand jury testimony would, of course, still be subject to applicable state evidentiary rules. 445 U.S. at 131-132.

Aloi argues that the opinion in *Apfelbaum* should be read to mean that the privilege against self-incrimination permits introduction of truthful immunized grand jury testimony at a perjury trial only if that testimony conforms to the applicable rules of evidence. Consequently, if the testimony is inadmissible, then its introduction would violate not only the rules of evidence but the privilege as well. The logic of this argument would mean that the scope of the privilege against self-incrimination would vary depending

upon the state in which the immunized testimony is offered at trial. The difficulty with such an argument is that it is seemingly inconsistent with the Court's recognition in *Apfelbaum* that the exception to the Fifth Amendment privilege permitting the introduction of immunized grand jury testimony is a "complete" one. 445 U.S. at 131-132.

Any other view of *Apfelbaum* would require this Court to determine the scope of the Fifth Amendment privilege by undertaking to examine the evidentiary rules relating to relevance in each state. In short, the Court would be required to engage in the development of evidentiary rules, a role this Court has traditionally refrained from doing, especially in the case of state-created crimes. *See Spencer* v. *Texas,* 385 U.S. 554, 562, 564, 568-569 (1967). Even to the extent that this Court might engage in such a role under certain circumstances, for example, where a state's evidentiary rules prevent a defendant from presenting evidence critical to his defense, *Chambers* v. *Mississippi,* 410 U.S. 284 (1973), this case presents no such situation.

There is still another reason why this case is not an appropriate one to review a state court's evidentiary ruling. It is not an appropriate case because even assuming the arguability of Aloi's novel approach to the scope of the complete exception recognized in *Apfelbaum,* that case is but a few months old. Accordingly, until the issue has been explored by the various federal and state courts, there is little reason to decide it at this time.

Still further militating against review is the fact that the only issue here is whether particular questions and

answers before a grand jury investigating the killing of an organized crime figure were relevant and admissible in a state perjury prosecution against Aloi for lying to that grand jury. The Court is being asked essentially to review whether evidence which both the New York courts* and the Second Circuit,** upon remand, concluded was properly introduced at trial conformed to the rules of evidence. The propriety of an evidentiary ruling hardly seems like the kind of issue calling for a grant of certiorari.

In addition, this Court would have to resolve an evidentiary question even though defense counsel, at trial, failed to raise specific grounds in challenging the admission of the nonperjurious grand jury testimony. Indeed, defense counsel persisted in making only a blanket objection (except as to one request for deletion which was granted) even though the trial judge directed him to make specific objections to the testimony he wanted omitted. Given this posture, there is no reason to review the merits of objections not made at trial. *See Hill* v. *California*, 401 U.S. 797, 805-806 (1972); *Johnson* v. *United States*, 318 U.S. 189, 201 (1943); *see also Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

In sum, the question of whether the evidence in this particular state prosecution was properly admitted simply

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* Significantly, the New York courts have not been hesitant to reverse convictions where they have found irrelevant prejudicial grand jury testimony admitted into evidence. *See People* v. *McGrath*, 46 N.Y.2d 12, 32 (1978).

** Since the Second Circuit evidently concluded that the evidence was properly admitted under New York law, Aloi can find little solace in his reliance on the District Court and Second Circuit opinions, prior to the *Apfelbaum* decision, which suggest that the introduced testimony was not relevant (Pet. A. 7-8).

does not present a substantial federal question, especially in light of defense counsel's failure to make specific trial objections to the now challenged evidence.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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